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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

GEORGE CHAPMAN, JR. and BRENDA J.)
GULLY CHAPMAN,

Plaintiffs,

v.

DEUTSCHE BANK NATIONAL TRUST
COMPANY, et al.,

Defendants.

3:09-cv-00228-RCJ-VPC

ORDER

Currently before the Court are Defendants' Motion to Dismiss Complaint (#4) and Request for Judicial Notice in Support of Motion to Dismiss (#5) filed on May 6, 2009. Plaintiffs filed an Opposition to Motion to Dismiss (#13) on November 8, 2009, and Defendants filed a Reply (#14) on January 7, 2010.

Also before the Court is Plaintiffs' Motion to Remand Case to State District Court (#6) filed on May 11, 2009. Defendants filed an Opposition to Motion to Remand (#8) on May 29, 2009, and Plaintiffs filed a Reply (#9) on May 31, 2009.

The Court heard oral argument on the motions on January 8, 2010.

BACKGROUND

This case involves a claim by Plaintiffs George Chapman and Brenda Chapman (collectively referred to herein as "Plaintiffs") that Defendants Deutsche Bank National Trust Company, National Default Servicing Corporation, and HomEq Servicing (collectively referred to herein as "Defendants") engaged in a wrongful and illegal foreclosure on Plaintiffs' property.

On March 30, 2009, Plaintiffs filed a complaint in the Second Judicial District Court of the State of Nevada in and for the County of Washoe ("Second Judicial District Court") against

1 Defendants based on the foreclosure of their home in Washoe Valley, Nevada. (Notice of
2 Removal of Action Based on Diversity (#1) at 6). According to the allegations of the
3 complaint, Plaintiffs "were attempting to modify a mortgage taken out to refinance their home
4 in order to pay for Plaintiff George Chapman's cancer treatments" when Plaintiffs "fell behind"
5 on their mortgage payments. Id. at 7-8. Plaintiffs allege that they were "constantly told that
6 everything would be worked out" and that they would be able to "keep their home" by
7 Defendant HomeEq Servicing. Id. However, Plaintiffs state that unbeknownst to them,
8 "Defendants were in the process of foreclosing upon Plaintiffs' home while negotiating a loan
9 modification." Id. at 8. Plaintiffs further allege that they were "never given notice of default;
10 nor notice that foreclosure was scheduled; nor notice of the trustee's sale and no notice of the
11 filing of a deed upon their property." Id.

12 In their complaint, Plaintiffs filed claims for injunctive relief, declaratory relief, and to
13 quiet title. In their cause of action for injunctive and declaratory relief, Plaintiffs assert that the
14 foreclosure on their home was illegal because they were "never given statutory notice of the
15 default nor notice of the trustee's sale as required by law and by statutory provisions
16 contained in the deeds of trust." Id. Plaintiffs assert that the "failure to adhere to the statutory
17 notice provisions and the provisions in the deed of trust are substantial irregularities, illegal,
18 and grounds to vacate the sale." Id. As such, Plaintiffs argue that they are entitled to
19 declaratory and injunctive relief prohibiting the foreclosure of their home. In addition, Plaintiffs
20 seek general damages, special damages and punitive damages.

21 Following the filing of the complaint, Defendants filed a timely Notice of Removal of
22 Action Based on Diversity (#1). According to the notice of removal, "diversity of jurisdiction
23 exists as conferred by 28 U.S.C. § 1332." Id. at 2. Specifically, Defendants argue that
24 Plaintiffs, who are citizens of Nevada, are completely diverse from Defendants who are
25 citizens of: Delaware, New York, Arizona, and California. In addition, Defendants assert that
26 the amount in controversy exceeds \$75,000. Id. at 3. After filing their notice of removal,
27 Defendants filed a motion to dismiss pursuant to Rule 12(b)(6). A few days later, Plaintiffs
28 filed a motion to remand. For the following reasons, the Court denies Plaintiffs' motion to

1 remand and grants Defendants' motion to dismiss.

2 DISCUSSION

3 I. Motion to Remand

4 Under 28 U.S.C. § 1441, "a defendant may remove an action filed in state court to
 5 federal court if the federal court would have original subject matter jurisdiction over the
 6 action." Moore-Thomas v. Alaska Airlines, Inc., 553 F.3d 1241, 1243 (9th Cir. 2009).
 7 "Only state-court actions that originally could have been filed in federal court may be
 8 removed to federal court by the defendant." Caterpillar Inc. v. Williams, 482 U.S. 386, 392,
 9 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). As such, in order for removal to be proper, there
 10 must either be federal-question jurisdiction or diversity of citizenship. Id.

11 Diversity jurisdiction is governed by 28 U.S.C. § 1332. According to that statute, the
 12 district courts "shall have original jurisdiction of all civil actions where the matter in
 13 controversy exceeds the sum or value of \$75,000" and is between "citizens of different
 14 States." 28 U.S.C. 1332(a). For purposes of section 1441 and section 1332, "a
 15 corporation shall be deemed to be a citizen of any State by which it has been incorporated
 16 and of the State where it has its principal place of business." 28 U.S.C. § 1332(c)(1).

17 In this matter, Plaintiffs allege in their complaint that they are citizens of the State of
 18 Nevada. (Notice of Removal of Action Based on Diversity (#1) at 3). The complaint does
 19 not specifically allege the citizenship of Defendants. Rather, it identifies each defendant
 20 corporation and states that they are registered with the Nevada Secretary of State.¹ In
 21 their notice of removal, Defendants provide public records from various secretaries of state
 22 to showing that none of the Defendants are citizens of Nevada. In this regard, HomEq is a
 23 Delaware corporation with a principal place of business in New York. Id. at 3. National is
 24 an Arizona corporation with its principal place of business in Phoenix, Arizona. Id.

25
 26 ¹ Specifically, the complaint alleges that: Deutsche Bank National Trust Company ("Deutsche")
 27 is a "German national corporation, registered with the Nevada Secretary of State;" National Default
 28 Servicing Corporation ("National") is "an Arizona corporation, registered with the Nevada Secretary of
 State; and HomEq Servicing Corporation ("HomEq") is "a California corporation whose registration was
 withdrawn with the Nevada Secretary of State." Id.

1 Deutsche "is a national banking association . . . organized and existing in the State of New
2 York with a principal place of business in California." Id. As such, the parties are diverse.

3 Despite the fact that diversity exists in this case, Plaintiffs filed a motion to remand
4 the action to state court. In their motion to remand, Plaintiffs do not deny that there is
5 diversity jurisdiction over this action. Rather, Plaintiffs argue that the Court should abstain
6 from exercising its jurisdiction because one of the Defendants filed an unlawful detainer
7 action against the Plaintiffs in Reno Justice Court, and because "Plaintiffs have requested
8 equitable relief for real property - traditionally a state area of jurisdiction." (Motion to
9 Remand (#6) at 3). Defendants contest these assertions and argue additionally that the
10 case was properly removed to this Court based on diversity jurisdiction.

11 "A motion to remand is the proper procedure for challenging removal." Moore-
12 Thomas, 553 F.3d at 1244. "The removal statute is strictly construed and any doubt about
13 the right of removal requires resolution in favor of remand." Id. "It is to be presumed that a
14 cause lies outside [the] limited jurisdiction [of the federal courts] and the burden of
15 establishing the contrary rests upon the party asserting jurisdiction." Abrego Abrego v.
16 Dow Chem. Co., 443 F.3d 676, 684 (9th Cir. 2006)(quoting Kokkonen v. Guardian Life Ins.
17 Co. of Am., 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994)(alterations in
18 original). The "strong presumption against removal jurisdiction means that the defendant
19 always has the burden of establishing that removal is proper," and that the court resolves
20 all ambiguity in favor of remand to state court. Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th
21 Cir. 1992).

22 **A. Waiver**

23 Plaintiffs first argue that remand is proper because Defendants selected the state
24 forum to litigate this action by filing an offensive action of unlawful detainer in the Reno
25 Justice Court.

26 "A party, generally the defendant, may waive the right to remove to federal court
27 where, after it is apparent that the case is removable, the defendant takes actions in state
28 court that manifest his or her intent to have the matter adjudicated there, and to abandon

1 his or her right to a federal forum." Resolution Trust Corp. v. Bayside Developers, 43 F.3d
 2 1230, 1240 (9th Cir. 1994). "A waiver of the right to removal must be clear and
 3 unequivocal." Id. "In general, 'the right of removal is not lost by action in the state court
 4 short of proceeding to an adjudication on the merits.'" Id. (quoting Beighley v. FDIC, 868
 5 F.2d 776, 781 (5th Cir. 1989)).

6 In this matter, Defendants have not waived their right to remove this action based
 7 on the unlawful detainer proceeding filed in the Reno Justice Court. That action was a
 8 separate lawsuit filed by Deutsche against Plaintiffs three months before Plaintiffs filed
 9 their complaint in this action. (Motion to Remand (#6) at Exhibit 1). Although the two
 10 cases involve the same property, the unlawful detainer action was brought pursuant to the
 11 Nevada statutory provisions governing such proceedings under the jurisdiction of the
 12 justice court. This case, on the other hand, was filed in the Second Judicial District Court
 13 alleging claims of wrongful foreclosure. Defendants did not take any action in the case
 14 pending before the Second Judicial District Court before filing their notice of removal.²
 15 Because the two proceedings are distinct, Deutsche's filing of an unlawful detainer action
 16 in Justice Court does not waive the Defendants' ability to remove a later filed case to
 17 federal court when there is proper grounds for jurisdiction.

18 B. Abstention

19 Plaintiffs also argue that remand is necessary because of the in rem nature of this
 20 action. Specifically, Plaintiffs argue that "diversity cannot trump the state court's
 21 jurisdiction over local real property." (Reply (#9) at 3). According to Plaintiffs, it is
 22 "impossible for this Court to obtain jurisdiction over local real property via removal because
 23 Plaintiffs had to file in state court before any removal action." Id. at 4.

24 In this matter, Plaintiff has improperly characterized this action as an in rem

25
 26 ² The majority of cases that address substantial offensive or defensive actions in state court only
 27 contemplate actions taken by a defendant in the removed case. See Yuseffzadeh v. Nelson, Mullens,
Riley & Scarborough LLP, 365 F.3d 1244, 1246 (11th Cir. 2004); Oster v. Standard Life Ins. Co., 2009
WL 1260174 (N.D.Cal. 2009); Doijode v. Sears, Roebuck and Co., 2006 WL 149007 (N.D.Cal. 2006);
Cogdell v. Wyeth, 366 F.3d 1245 (11th Cir. 2004).

1 proceeding. See 28 U.S.C. §2409(a); Leisnoi, Inc. v. U.S., 170 F.3d 1188, 1192 (9th Cir.
 2 1999). An action in rem generally involves or determines the status of a piece of property.
 3 Here, although there is property involved, the focus of this action is breach of contract and
 4 wrongful foreclosure. The central issues do not relate to the property - but the loan on the
 5 property and alleged misstatements made during the loan modification process. As noted
 6 in the complaint, Plaintiffs allege that Defendants engaged in wrongful conduct because
 7 while Plaintiffs were attempting to modify their mortgage, Defendants "constantly" told
 8 them that everything would be worked out and that "new interest and rate payments" would
 9 allow Plaintiffs to keep their home. These allegations do not implicate the actual property,
 10 but, rather, allege contractual obligations that were breached when Defendants foreclosed.

11
 12 Based on the foregoing, there is no merit to Plaintiffs' assertions that remand of this
 13 action is required by virtue of the state court's assumption of jurisdiction over the subject
 14 real property prior to removal.

15 Thus, the Court concludes that remand is not warranted and Plaintiffs' motion is
 16 denied.

17 **II. Motion to Dismiss**

18 Also before the Court is a motion to dismiss filed by the Defendants pursuant to
 19 Rule 12(b)(6) on the ground that Plaintiffs' complaint fails to state a claim upon which relief
 20 can be granted.

21 **A. Legal Standard**

22 In considering a motion to dismiss for failure to state a claim under Fed. R. Civ. P.
 23 12(b)(6), the court must accept as true all material allegations in the complaint as well as
 24 all reasonable inferences that may be drawn from such allegations. LSO, Ltd. v. Stroh,
 25 205 F.3d 1146, 1150 (9th Cir. 2000). The allegations of the complaint must be construed
 26 in the light most favorable to the nonmoving party. Shwarz v. United States, 234 F.3d 428,
 27 435 (9th Cir. 2000). The purpose of a motion to dismiss under Rule 12(b)(6) is to test the
 28 legal sufficiency of the complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001).

1 However, there is a strong presumption against dismissing an action for failure to state a
 2 claim. See Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997) (citation
 3 omitted).

4 To avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed factual
 5 allegations; rather, it must plead "enough facts to state a claim to relief that is plausible on
 6 its face." Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting
 7 Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1974 (2007)). Moreover, the facts included
 8 "must be enough to raise a right to relief above the speculative level." Twombly, 127 S.Ct.
 9 at 1964-65. "The pleading must contain something more ... than ... a statement of facts
 10 that merely creates a suspicion [of] a legally cognizable right of action ." Id. at 1965.

11 Although a court's review on a 12(b)(6) motion to dismiss is generally "limited to the
 12 contents of the complaint," the court may also consider documents attached to the
 13 complaint, documents incorporated by reference in the complaint, or matters of judicial
 14 notice without converting the motion into a motion for summary judgment. See Durning v.
 15 First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987).

16 According to Defendants, the "boilerplate complaint concedes that Plaintiffs
 17 defaulted on their mortgage loan and that foreclosure was completed." (Motion to Dismiss
 18 (#4) at 2). According to Defendants, "Plaintiffs do not make any allegations that they have
 19 been making the required payments on their loan, or that they have cured their default."
 20 Id. at 10. Defendants also assert that contrary to Plaintiffs' claims, Plaintiffs received all
 21 statutory notice of default and trustee's sale as required by Nevada law.³ In addition,
 22 Defendants state that any allegation by Plaintiff that they had orally agreed to a loan
 23 modification is not enforceable to prevent the foreclosure because "a loan modification
 24 must be in writing under the Statute of Frauds." Id.

25 In response, Plaintiffs again assert that they were never given the proper
 26 foreclosure notices under Nevada law. (Opposition to Motion to Dismiss (#13) at 2).

27
 28 ³ Defendants attached copies of the notices sent to Plaintiff in their Request for Judicial Notice
 in Support of Motion to Dismiss (#5).

1 According to Plaintiffs, their "complaint adequately pleads that the foreclosure was legally
2 inadequate," and that proper NRS foreclosure procedure was not followed. Id. at 3.

3 **B. Request for Judicial Notice and Authentication of Exhibits**

4 In addition to disputing the substantive arguments in Defendants' motion to dismiss,
5 Plaintiffs argue that the Court should not take judicial notice of the documents attached to
6 Defendants' motion to dismiss. "Defendants base their entire Motion upon their
7 corresponding Request for Judicial Notice containing about 50 pages of hearsay
8 photocopies of photocopies that appear to be some loan and title documents." Id.
9 Plaintiffs assert that "none of the photocopies of photocopies meet the requirements for
10 judicial notice." Id. Moreover, Plaintiffs argue that these documents have not been
11 authenticated by Defendants.

12 At issue in this matter are several documents attached to Defendants' motion to
13 dismiss as evidentiary support that Plaintiffs received all foreclosure notices as required
14 under Nevada law. Defendants argue that these documents are all either public records or
15 referenced in the complaint. In addition, in their Reply (#14), Defendants' counsel filed a
16 declaration in support of the request for judicial notice authenticating the documents
17 attached as exhibits. The following is a list of the documents to be considered for judicial
18 notice:

19 Exhibit 1: A copy of a Note dated September 19, 2005, signed by Plaintiffs in the
20 original principal amount of \$341,250.00.

21 Exhibit 2: A copy of a Deed of Trust dated September 19, 2005, signed by Plaintiffs
22 and recorded in the Official Records of the Washoe County Recorder as Instrument No.
23 3282040.

24 Exhibit 3: A copy of Plaintiffs' Default Forbearance Agreement dated July 15, 2008
25 and signed by Plaintiffs.

26 Exhibit 4: A copy of a Substitute of Trustee recorded in the Official Records of the
27 Washoe County Recorder on July 9, 2008 as Instrument No. 3667659.

28 Exhibit 5: Copies of a Notice of Default recorded in the Official Records of the

1 Washoe County Recorder's Office on April 2, 2008 as Instrument No. 3636557.

2 Exhibit 6: Copies of a Notice of Trustee's Sale recorded in the Official Records of
3 the Washoe County Recorder's Office on July 9, 2009 as Instrument No. 3667669,
4 Affidavits of Mailing, Certificate of Posting, and proof of publication.

5 A court may take judicial notice of certain facts under Federal Rule of Evidence 201
6 including copies of public records. "A court may take judicial notice of 'matters of public
7 record' without converting a motion to dismiss into a motion for summary judgment,' as
8 long as the facts are not subject to reasonable dispute." Lee v. City of Los Angeles, 250
9 F.3d 668, 689 (9th Cir. 2001).

10 Here, Exhibits 2, 4, 5 and 6 (which include a Copy of the Deed of Trust, a Copy of a
11 Substitute Trustee, a Notice of Default, and Notice of Trustee's Sale) all bear a file stamp
12 from the Washoe County Recorder's office. As such, these exhibits are part of an official
13 record and proper for judicial notice. Bouyer v. GMAC Mortg., 2009 WL 2877603 *4 at n. 3
14 (E.D. Cal. 2009). In addition, they have been authenticated by Defendants' counsel.

15 As to the remaining two exhibits, the Note signed by Plaintiffs in 2005 and the
16 default forbearance agreement, these documents are referenced in the complaint and the
17 Court may consider them in ruling on a motion to dismiss. In addition, they have been
18 authenticated by Defendants' counsel's affidavit.

19 **C. Analysis**

20 Following authentication of the documents at issue in this matter, the Court grants
21 Defendants' motion to dismiss because Defendants complied with the non-judicial
22 foreclosure requirements established under Nevada law. NRS 107.080 governs the non-
23 judicial foreclosure process. That statute provides notice requirements that must be
24 satisfied in order for a foreclosure to be valid. First, the statute requires that the trustee or
25 beneficiary execute and record "in the office of the recorder of the county wherein the trust
26 property . . . is situated a notice of the breach and of his election to sell or cause to be sold
27 the property to satisfy the obligation." NRS 107.080(2)(b). Then, after three months have
28 lapsed, the trustee, or other authorized person, shall, "before the making of the sale, give

1 notice of the time and place thereof by recording the notice of sale" and satisfying three
2 additional notice requirements. These notice requirements include: (1) providing notice to
3 the trustor or any other person entitled to notice pursuant to this section by personal
4 service or by mailing the notice by registered or certified mail to the last known address of
5 the trustor; (2) posting a similar notice for 20 days in three public places in the town where
6 the property is located; and (3) publishing a copy of the notice three times, once each
7 week for 3 consecutive weeks in a newspaper of general circulation. NRS 107.080(4)(a)-
8 (c).

9 Here, the documents submitted in Defendants' Request for Judicial Notice evidence
10 the fact that Defendants complied with the foregoing notice requirements. Specifically, a
11 Notice of Default was issued and recorded on April 2, 2008. See Request for Judicial
12 Notice (#5) at Exhibit 5. The Notice of Default was mailed, via certified mail, to the
13 property address of record. Id. Following that, a Notice of Sale was issued and recorded
14 over three months later on July 9, 2008. This Notice of Sale was mailed, via certified mail,
15 to the property address of record, was posted at three separate locations, and published in
16 the Reno Gazette-Journal between the dates of July 11, 2008, and July 25, 2008. Id. at
17 Exhibit 6.

18 Following the recording of the Notice of Sale, the parties entered into a default
19 forbearance agreement on July 15, 2008. That agreement held the foreclosure sale in
20 abeyance "so long as Borrower makes all payments required" under the agreement. See
21 Request for Judicial Notice (#5) at Exhibit 3. That agreement also provided that the
22 foreclosure would not be cancelled "until the successful completion of the terms of the
23 agreement," and that there would be no further demands or notices. Id. When Plaintiffs
24 failed to make the payments under the forbearance agreement, Defendants proceeded
25 with foreclosure.

26 Based on the foregoing, Defendants are entitled to an order dismissing the wrongful
27 foreclosure claims asserted against them because they complied with the notice
28 requirements set forth under Nevada law. As such, Plaintiffs' claims for relief are

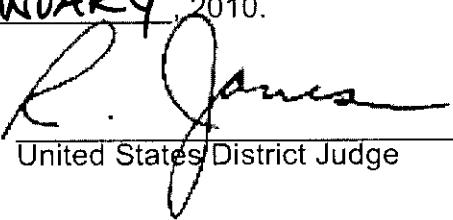
1 dismissed.

2 **CONCLUSION**

3 For the foregoing reasons, IT IS ORDERED that Plaintiffs' Motion to Remand to State
4 Court (#6) is DENIED.

5 IT IS FURTHER ORDERED that Defendants' Motion to Dismiss Complaint (#4) is
6 GRANTED.

7 DATED: This 26 day of JANUARY, 2010.
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9 
10 United States District Judge